

- (2) The period of time claimant was temporarily totally disabled.
- (3) Whether the Administrative Law Judge erred in assessing the cost of the transcript of the pre-hearing settlement conference to the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) On November 30, 1988, claimant, while working for the respondent as the bakery department manager, caught her left hand in a bread dough cutting machine. Claimant sustained an amputation of her left index finger and middle long finger. Claimant was taken to Shawnee Mission Medical Center in Shawnee Mission, Kansas. She was treated by orthopedic surgeon, William O. Reed, Jr., M.D. The doctor attempted to surgically implant both the index and the long middle finger. He was only successful with the implantation of the long middle finger. Claimant's left hand is her dominant hand.

Claimant was hospitalized from November 30, 1988 through December 21, 1988. During her hospitalization, she underwent a vein graft inner position repair of the dorsal vein of the left middle long finger, utilizing a vein graft from the dorsum of her right foot. Claimant developed a right retroperitoneal hematoma caused by heparinization treatment while she was hospitalized for the injury. A catheter was required to be placed in claimant's low back area in order to drain the hematoma. After claimant's hospitalization, she continued to be treated by Dr. Reed who placed claimant in a physical therapy program. In addition, to claimant's left-hand injury, she also developed pain in her low back and right leg as complications from the retroperitoneal hematoma which resulted in femoral nerve involvement.

Dr. Reed returned claimant to work on June 8, 1989, with no restrictions. Claimant, however, only worked one and a half days and did not return to work. At that time, respondent terminated her employment. Claimant testified she could not do the work and quit because the ladies she was working with had to help lift and do everything for her. Dr. Reed noted on June 22, 1989, that he understood claimant's difficulty in returning to her previous job life. The doctor further opined in a letter dated March 1, 1990, that claimant had sustained a very significant upper extremity injury and it was not uncommon for psychological difficulties to follow this type of injury. The doctor went on to recommend that claimant receive psychological care. He concluded that claimant was unable to return to her previous occupation.

Dr. Reed examined claimant on September 23, 1993, for the purpose of assessing permanent functional impairment for claimant's injuries. In a letter to claimant's attorney dated December 2, 1993, Dr. Reed assessed a 6 percent whole body rating to claimant's

right lower extremity; a 14 percent whole body rating to claimant's left upper extremity which he combined for a 19 percent whole body rating. Dr. Reed opined claimant was limited in her finger dexterity and forcible gripping on the left. He also stated claimant would have occasional pain in her right lower extremity.

In January 1990, claimant moved to live with her son, daughter-in-law, and grandson in Knoxville, Tennessee. Claimant received further medical treatment for her injuries through the Carolina Hand Clinic and the Knoxville Orthopedic Clinic. Following a preliminary hearing held on April 11, 1990, claimant also received psychological treatment through Dr. Gebrow, a psychiatrist, located in Knoxville, Tennessee.

The evidentiary record contains the testimony of the claimant; her daughter; her son, her sister; her treating physician, William O. Reed, Jr., M.D.; and Warren G. Phillips, M.D., a psychiatrist. All of these individuals established that prior to claimant's injury she was an outgoing and very attractive person. However, following her injury claimant became very depressed and withdrew from contact with people in general. Dr. Warren Phillips examined and interviewed the claimant on April 14, 1994. The doctor concluded that claimant suffered from post-traumatic stress disorder for the first two and a half or three years following her accident. Dr. Phillips further opined claimant was unable to work because she was 80 to 90 percent disabled on a psychiatric basis. Dr. Phillips attributes claimant's psychiatric problems to her work-related accident. He assessed claimant with a 10 percent permanent psychiatric disability in accordance with the AMA's Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) which he related to claimant's loss of her self image and her concern about people looking at her crippled hand.

At the request of claimant's attorney, claimant was examined by orthopedic surgeon, Nathan Shechter, M.D., of Kansas City, Missouri, on April 11, 1990, and again on September 22, 1993. Dr. Shechter found claimant had suffered permanent injuries to her left upper extremity, right lower extremity, and low back as a result of her work-related accident. He opined, based on the AMA's Guides to the Evaluation of Permanent Impairment, Third Edition (Revised); the Orthopedic Guide to Evaluation of Permanent Impairment, and his personal experience, that claimant had sustained a 19 percent whole body permanent functional impairment of her left upper extremity; a 4 percent whole body permanent functional impairment of her right lower extremity; and a 3 percent whole body permanent functional impairment of the low back. Dr. Shechter combined those ratings for a total of 24 percent whole body permanent functional impairment. Dr. Shechter further opined claimant was unable to perform fine activities with her left hand; she should do no repetitive bending, lifting, or squatting; she should be limited to a single lift from 40 to 45 pounds; and she should be limited to no lifting on a repetitive basis. At the time Dr. Shechter examined the claimant the second time on September 22, 1993, he found claimant had received additional surgery to her left hand in 1990 in Tennessee and that she had been fitted with a left index finger prosthesis at the Carolina Hand Center in Charlotte, North Carolina. Dr. Shechter's opinion in regard to claimant's permanent

functional impairment and restrictions, however, did not change as a result of the September 22, 1993, examination.

The Administrative Law Judge found claimant had failed to prove by a preponderance of the credible evidence that she sustained a work disability in excess of permanent functional impairment. The Administrative Law Judge limited claimant's entitlement to permanent partial disability benefits of 35 percent based on permanent functional impairment. He found claimant had a 20 percent functional impairment from an orthopedic standpoint, a 10 percent functional impairment from a psychiatric standpoint and a 5 percent functional impairment as a result of disfigurement. Claimant's date of accident was November 30, 1988, and therefore, her permanent partial disability benefits are determined as defined in K.S.A. 1988 Supp. 44-510e(a) which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The respondent argues claimant was able to return to her job as a bakery manager and to earn a comparable wage following her accident. Therefore, the respondent claims the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e(a) applies and the claimant is limited to an award based on her functional impairment. Respondent urges the Appeals Board to affirm the award of the Administrative Law Judge.

In order for the no work disability presumption to apply, the injured worker has to engage in work for wages comparable to the average gross weekly wage the worker was earning at the time of the injury. The only evidence contained in the record that claimant engaged in work at a comparable wage following her injury is the two days she attempted to return to work for the respondent in June 1989. The Appeals Board finds based on claimant's testimony, Dr. Reed's testimony and Dr. Phillip's testimony, that claimant at that time was not, at least from a psychological perspective, able to perform her job duties. Accordingly, the Appeals Board finds claimant is eligible for permanent partial disability benefits based on the work disability test contained in K.S.A. 1988 Supp. 44-510e(a) should work disability exceed her functional impairment.

Two vocational experts testified in this case, Gary Weimholt for the respondent and Donald R. Vogenthaler, Rh.D., for the claimant. Mr. Weimholt personally interviewed the claimant on December 28, 1994, and also had the benefit of medical reports from claimant's treating and evaluating physicians. Based on the permanent restrictions imposed by Dr. Shechter and utilizing the State of Kansas' labor market, Mr. Weimholt opined claimant had lost 22 percent of her ability to perform work in the open labor market. However, because Mr. Weimholt was of the opinion claimant had the ability to return to her bakery manager job for the respondent post-injury, he opined claimant retained her ability to earn a comparable wage. Mr. Weimholt testified the bakery job did not require an employee to perform fine activities with her fingers.

Conversely, Dr. Vogenthaler opined, also utilizing Dr. Shechter's permanent restrictions and based on the State of Kansas labor market, that claimant lost 83 percent of her ability to perform work in the open labor market. Dr. Vogenthaler did not feel claimant could return to her bakery management with respondent. He opined that the bakery job required the claimant to perform fine finger activities that claimant no longer possessed the ability to perform and also the bakery job exceeded her permanent weight limit restrictions. Therefore, Dr. Vogenthaler opined claimant's post-injury wage loss was in the range of 55 to 65 percent.

The Appeals Board finds the bakery job claimant was performing for respondent at the time of her injury exceeded the permanent weight restrictions placed on claimant by Dr. Shechter. Such job also required claimant to perform fine finger activities, which the Appeals Board finds she cannot perform post-injury. This conclusion is based on claimant's description of her job duties and Dr. Vogenthaler's description which he found in the Dictionary of Occupational Titles. Therefore, the Appeals Board concludes the most persuasive evidence in regard to the wage loss component of the work disability test is Dr. Vogenthaler's 55 to 65 percent opinion.

In regard to the loss of the claimant's ability to perform work in the open labor market, the Appeals Board finds both vocational experts' opinions should be given equal weight. The Appeals Board finds claimant's appropriate labor market loss lies somewhere between those two opinions. Giving equal weight to Mr. Weimholt's 22 percent and Dr. Vogenthaler's 83 percent, claimant's appropriate labor market loss is 52.5 percent. Accordingly, the Appeals Board concludes claimant's labor market loss of 52.5 percent and her loss of wage earning ability of 57.5 percent should be averaged, entitling claimant to a 55 percent work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990)

(2) Respondent paid claimant a total of 88.71 weeks of temporary total disability compensation. The claimant argues the record supports the finding that claimant was completely and totally incapable of engaging in any type of substantial and gainful employment for a period of some two and a half to three years following claimant's injury. See K.S.A. 1988 Supp. 44-510c(b)(2). In support of her argument, claimant points to her

own testimony, the testimony of her daughter, her son, and her sister which established that as a result of her severe hand injury and disfigurement, claimant practically withdrew from association with anyone outside of her immediate family for a period of time after the injury. Specifically, claimant contends the testimony of Dr. Phillips, the psychiatrist who examined the claimant, opined that for two and a half to three years following claimant's injury she was 80 to 90 percent disabled on a psychiatric basis. It was also Dr. Phillip's opinion claimant was not capable of working at that time because of her psychiatric problems. This evidence was uncontradicted by the respondent and the record does not show the evidence was untrustworthy or untruthful. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded, absent a showing that it is untrustworthy. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The Appeals Board finds the claimant has proved it is more probably true than not that she at least for a period of two and a half years from date of accident was temporarily and totally incapable of performing any substantial and gainful employment. Therefore, claimant is entitled to temporary total disability benefits from December 1, 1988 through May 31, 1991.

(3) The Administrative Law Judge assessed court reporting fees in the amount of \$142.70 against the claimant for the transcript made at claimant's request of the pre-hearing settlement conference held on July 20, 1994. The claimant submits that the Administrative Law Judge abused his discretion when he assessed the fee against the claimant instead of against the respondent. K.S.A. 44-555 grants the Administrative Law Judge the authority to assess all or part of the certified shorthand reporter's fee to any party to the proceedings. The claimant requested that the pre-hearing settlement conference held in this matter on July 20, 1994, be transcribed by a court reporter. As a result of this request, the Administrative Law Judge assessed the court reporter fees to the claimant which he has the authority by statute to do. The Appeals Board finds the Administrative Law Judge's decision to assess the court reporter fees of the settlement conference held on July 20, 1994, was reasonable and therefore, such decision is affirmed.

All other findings and conclusions of Administrative Law Judge set forth in Award that are not inconsistent with the above are adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Alvin E. Witwer dated January 30, 1996, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Aundra F. Pressley and against the respondent, Mission United Super, Inc., and its insurance carrier,

Liberty Mutual Insurance Company, for an accidental injury which occurred on November 30, 1988, and based upon an average weekly wage of \$405.00,

Claimant is entitled to 130 weeks of temporary total disability compensation at the rate of \$270.01 per week or \$35,101.30, followed by 285 weeks of permanent partial disability compensation at the rate of \$148.51 per week or \$42,325.35 for a 55% permanent partial general disability based on work disability, making a total award of \$77,426.65 which is all due and owing and is ordered paid in one lump sum less any amount previously paid.

All other orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Overland Park, KS
Stephanie Warmund, Kansas City, MO
Administrative Law Judge, Overland Park, KS
Philip S. Harness, Director